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CHARLES ELMORE C

IN THE

Supreme Court of the United States.

October Term, 1928.

No. ~~376~~. 45

INDIAN MOTOCYCLE COMPANY
v.
THE UNITED STATES OF AMERICA.

On Certificate from the Court of Claims.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE

JAMES S. Y. IVINS,
KINGMAN BREWSTER,
JOSEPH D. BRADY,
O. R. FOLSOM-JONES,
Amici Curiae.

INDEX.

	PAGE
Motion for leave to file brief	1
Brief	2

TABLE OF CASES.

Crewe Levick Co. *v.* Pennsylvania, 245 U. S. 292	3
Collector *v.* Day, 11 Wall., 113	3
Evans *v.* Gore, 253 U. S. 245	3
Peck & Co. *v.* Lowe, 247 U. S. 165	2
Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, 158 U. S. 601	2
U. S. Glue Co. *v.* Town of Oak Creek, 247 U. S. 321	2

IN THE

Supreme Court of the United States.

October Term, 1928.

No. 576.

INDIAN MOTOCYCLE COMPANY
v.
THE UNITED STATES OF AMERICA

On Certificate from the Court of Claims.

MOTION FOR LEAVE TO FILE BRIEF and BRIEF OF AMICI CURIAE.

MOTION.

The undersigned, attorneys for several manufacturers of articles designated in Section 600 of the Revenue Act of 1924, who sold such articles to states and municipalities, paying the tax under said section, and who have pending claims for the refund thereof, respectfully move this Court for leave to file the subjoined brief as friends of the Court. Counsel for both parties have given their consent.

JAMES S. Y. IVINS,
KINGMAN BREWSTER,
JOSEPH D. BRADY,
O. R. FOLSOM-JONES.

BRIEF.

The Treasury Department ruled that under Section 600 of the Revenue Act of 1924, a tax of five per cent was payable by the manufacturer upon the sale of a motorcycle, even though the sale was to a political subdivision of a state. This construction of the statute—or the statute itself, if such construction be unavoidable—is unconstitutional.

That the burden of the tax would be passed on and borne by the purchaser was expected—see Report of Ways and Means Committee quoted on p. 7 of plaintiff's brief. cf. Revenue Act of 1918 Section 1312. That the tax actually was borne by the municipality is apparent from the fact that the standard price of the motorcycle was increased by the exact amount of the tax, which increased price was paid by the municipality.

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, this Court was divided five to four on the question whether an income tax was direct or indirect—but it was unanimous in holding that the United States could not impose an income tax upon the interest on municipal bonds. The prevailing opinion, following the reargument, per Mr. Chief Justice Fuller (158 U. S. 601, 630) says:

> "We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it can not be sustained, because it is a tax on the power of the states and on their instrumentalities to borrow money, and consequently repugnant to the constitution."

Possibly the burden of that tax on the municipalities was indirect, as was the burden of the Federal income tax on exports in *Peck & Co.* v. *Lowe*, 247 U. S. 165, or the burden of the state income tax on interstate commerce in *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, and, it might not be possible exactly to measure the burden placed upon a municipality by a tax upon incomes generally. But, whether the burden was direct or indirect, it was held to be beyond the power of Congress to impose.

In the present case the burden upon the municipality was obviously direct (*Crewe Levick Co.* v. *Pennsylvania*, 245 U. S.

292), and its extent readily measurable. If the possibly indirect burden of the income tax of 1894 upon the borrowing power of the municipality rendered it unconstitutional, *a fortiori* the patently direct burden of the excise tax of 1924 upon the police power of the municipality renders it equally unconstitutional.

The fact that the tax is laid generally on all sales of automobiles, motorcycles, etc., does not justify it, any more than the generality of the income tax justifies its application to salaries of state officers (*Collector* v. *Day*, 11 Wall. 113) or of Federal judges (*Evans* v. *Gore*, 253 U. S. 245).

The collection of the tax was in violation of the Constitution. It should be refunded to the party from whom it was collected. Any adjustment between that party and the municipality is a matter for settlement between them according to the law that may be applicable.

The statute, to avoid the necessity of holding it unconstitutional, should be held not to have intended to tax sales to municipalities. The question certified by the Court of Claims should be answered in the negative.

Respectfully submitted,

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